

Overview of Global and Regional Human Rights Standards on the Police Use of Force

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In Khosa and others v. Ministry of Defence and others, in the context of excessive use of force during the COVID-19 lockdown, the High Court in Pretoria ordered the Minister of Defence and Military Veterans and the National Commissioner of the South African Police Service to publish guidelines on, among other things, the use of force by law enforcement officials.¹ This overview introduces the main international instruments and standards on the topic.

The United Nations (UN) and the African Union (AU) have developed a number of international instruments on the use of force by law enforcement officials (the police as well as the military, to the extent that they perform law enforcement functions) that the Republic of South Africa has adopted as binding.

Of particular importance in the United Nations context are the rights to life and to freedom from torture and other ill-treatment, contained in the 1966 *International Covenant on Civil and Political Rights* (ICCPR)² and the right to freedom from torture and other ill-treatment recognised in the 1984 *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT).³ The most relevant African Union instrument is the 1981 *African Charter on Human and Peoples' Rights* (ACHPR), which recognises the same rights.⁴ These rights are also explicitly protected under the South African Constitution and apply at all times and in all circumstances.

The obligations on all agencies to respect and protect life during law enforcement operations imposed by these treaties have been interpreted in greater depth in a number of other international instruments. The 1979 *UN Code of Conduct for Law Enforcement Officials* (UN Code of Conduct)⁵ and the 1990 *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (UN Basic Principles)⁶ have been recognised for decades as

¹ Judgment (Case No. 21512/2020), 15 May 2020, High Court (Gauteng Division, Pretoria), available at <https://www.scribd.com/document/461559607/Khosa-Judgment-May-15-2020>

² International Covenant on Civil and Political Rights; adopted at New York, 16 December 1966; entry into force, 23 March 1976. South Africa ratified the Covenant in 1998.

³ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; adopted at New York, 10 December 1984; entry into force, 26 June 1987. South Africa ratified the Convention in 1998.

⁴ African Charter on Human and Peoples' Rights; adopted at Banjul, 27 June 1981; entry into force, 21 October 1986. South Africa ratified the Charter in 1996.

⁵ *UN Code of Conduct for Law Enforcement Officials*, adopted by General Assembly resolution 34/169 of 17 December 1979.

Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

⁶ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*; adopted at Havana by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990. Available

authoritative in setting out the foundational rules on the use of force and firearms by law enforcement officials.

During the last five years, both the UN and the AU have adopted further documents setting out the applicable standards. In the United Nations, the Human Rights Committee adopted in 2018 *General Comment No. 36, article 6, right to life* (Human Rights Committee General Comment 36) dealing with the ICCPR.⁷ Likewise, the African Commission on Human and Peoples' Rights in 2015 adopted *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (African Commission General Comment 3).⁸

The *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (Minnesota Protocol),⁹ published by the Office of the UN High Commissioner for Human Rights, provides guidance to States on how to comply with the duty to investigate suspected violations of the rights to life. The 2020 *UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (UN Less Lethal Weapons Guidance)*¹⁰ details under what circumstances weapons that are less hazardous than firearms can be employed in law enforcement operations.¹¹

Global and Regional Human Rights Standards

The right to life

Article 6 (1) of the ICCPR stipulates that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 4 of the ACHPR stipulates that: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” The right to life is the “supreme right”.¹²

Under Section 11 of the South African Constitution, “Everyone has the right to life.”

The right to freedom from torture or ill-treatment

at <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-use-of-force-and-firearms-by-law-enforcement-officials/>.

⁷ *General Comment No. 36: Article 6: right to life*, UN doc. CCPR/C/GC/36, 3 September 2019. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&Lang=en.

⁸ *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia. Available at <https://www.achpr.org/legalinstruments/detail?id=10>.

⁹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, OHCHR, New York/Geneva, 2017. Available at <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>.

¹⁰ *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, OHCHR, Geneva, 2020 (hereinafter, *Less-Lethal Weapons Guidance*). Available at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

¹¹ Referenced by the High Court (Gauteng Division, Pretoria), in *Khosa and others v. Ministry of Defence and others*, Judgment (Case No. 21512/2020), 15 May 2020, para. 124.

¹² *Human Rights Committee General Comment No. 36*, para 2.

Article 7 of the ICCPR stipulates that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Articles 4 and 16 of CAT provide comparable protection. According to Article 5 of the ACHPR, “All forms of exploitation and degradation of man particularly ... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” The excessive use of force is prohibited under these provisions.

Under Section 12(1) of the South African Constitution, “Everyone has the right to freedom and security of the person, which includes the right ... (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way”.

Fundamental Principles on the Use of Force

Whether the conduct of law enforcement officials constitutes an arbitrary (and thus unlawful) deprivation of life, or ill-treatment, depends on compliance with five fundamental principles with respect to any use of force. These principles are legality, necessity, proportionality, precaution, and accountability. They are cumulative: all five must be met.

Legality

Rules governing the use of force, including on the weapons that may lawfully be used, must be set out in national legislation and other administrative provisions. States Parties to the ICCPR, such as South Africa, are required to take all necessary measures to prevent arbitrary deprivations of life or excessive use of force by their law enforcement officials, including by the adoption of appropriate legislation controlling the use of force by such law enforcement officials.¹³ States, likewise, have a responsibility under the African Charter to develop and implement a legal and practical framework to respect, protect, promote, and fulfil the right to life and the right against ill-treatment.¹⁴

Legislation and codes of conduct should fully reflect the general principles of legality, necessity, proportionality, precaution, and accountability.

Necessity

In addition to meeting the requirement of legality, the police and other law enforcement officials may only use force when it is necessary to do so for a legitimate law enforcement purpose. According to the 1979 *UN Code of Conduct*, “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”¹⁵

When force may lawfully be used, that force shall be only the minimum necessary in the circumstances.¹⁶ Where the same objective can be reached by using less force, or no force at all, that route should be followed. According to the 2020 *UN Less-Lethal Weapons Guidance*,

¹³ *Human Rights Committee General Comment No. 36*, para. 13.

¹⁴ *African Commission General Comment No. 3*, para. 7.

¹⁵ *UN Code of Conduct*, art. 3.

¹⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN doc. A/HRC/26/36, 1 April 2014, para. 59.

“Once the need for force has passed, no further force is lawful. Arrest and detention shall never be used to justify the excessive, abusive or punitive use of force or any form of cruel, inhuman or degrading treatment or punishment.”¹⁷ For example, when a suspect is handcuffed and is not resisting arrest, no additional force may be used.

Proportionality

Force shall only be lawful if it is not only necessary but also proportionate to the threat posed by a suspect and/or the harm that a law enforcement official is seeking to avoid.¹⁸

Proportionality sets a ceiling on the permissible use of force, even if the use of some force is necessary in the circumstances to prevent a crime or the escape of a suspect. As the commentary to the 1979 *UN Code of Conduct* observes, in no case may force be used which is disproportionate to the legitimate objective to be achieved.¹⁹ Proportionality is especially important with respect to the use of firearms.

Any force used in the course of an arrest should be proportionate to the objective sought and the resistance faced. Arrest shall be carried out only for a legitimate law enforcement objective. In the case of a person fleeing arrest, particular attention must be given to the principle of proportionality: the degree of force used to prevent the escape must be balanced against the seriousness of the threat posed by the person fleeing.²⁰ Even if there is no other way to stop the proverbial apple thief from running away, lethal force may not be used to prevent escape.

Precautionary measures

Operations must also be planned so as to minimise the risk of death or injury. The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its law enforcement agents. The measures that have to be taken include, but are not limited to, the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations.²¹

Such equipping includes provision for the officers both of personal protective equipment and of less-lethal weapons (weapons that are less dangerous than firearms). The 2020 *UN Guidance on less-lethal weapons* covers the use of such weapons during arrest, in custodial settings, and in public order policing (for example demonstrations). The *Guidance* describes how police batons, kinetic impact projectiles, and tear gas may be used in compliance with human rights standards, as well as detailing what use would violate fundamental human rights. Aiming at the head, for instance, will be unlawful. Procedures for the appropriate use of each less-lethal weapon must be set out as clear standing operating procedures, either within or annexed to a code of conduct for law enforcement officials.²²

¹⁷ *UN Less-Lethal Weapons Guidance*, para. 6.1.1. The European Court of Human Rights has held that “in respect of a person who is ... confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement” of the right to freedom from torture and ill-treatment treatment. European Court of Human Rights, *Bouyid v. Belgium*, Judgment (Grand Chamber), 28 September 2015, paras. 88, 100.

¹⁸ Principle 5(a), 1990 *UN Basic Principles*.

¹⁹ Commentary to art. 3, 1979 *UN Code of Conduct*.

²⁰ *UN Less-Lethal Weapons Guidance*, para. 6.1.1.

²¹ *African Commission General Comment No. 3*, para. 27.

²² *UN Less-Lethal Weapons Guidance*, para. 2.5.

Medical assistance must be provided to any person, including a criminal suspect, who has been injured during action by any law enforcement official.²³

Accountability for potentially unlawful use of force

The police and other law enforcement officials shall furthermore be held accountable for their use of force. Each use of force, irrespective of the weapon used, must be justified and justifiable. Rules and regulations on the use of firearms should include procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them.²⁴

The state must ensure a proper investigation where there is reason to believe that an arbitrary deprivation of life, or an act of torture or ill-treatment, may have taken place and, where applicable, criminal prosecutions must be instituted.²⁵ The rules on accountability for unnatural death, also at the hands of law enforcement officials, has been restated in the *Minnesota Protocol* in 2016. The *Minnesota Protocol* stipulates that where a State agent has caused the death of a detainee, or where a person has died in custody, this must be reported, without delay, to a judicial or other competent authority that is independent of the detaining authority and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such a death.

Specific Rules on the Use of Firearms

In addition to the rules set out above, which apply to all uses of force, additional, specific rules apply to any use of firearms in law enforcement. A law enforcement official may only discharge a firearm when it is necessary in the circumstances to do so to stop an imminent threat of loss of life or serious injury.²⁶ An imminent threat is one that is expected to materialise in actual harm in a split second or at most a matter of seconds.²⁷ Where a threat to life is grave and proximate in time, but not imminent, exceptionally a firearm may be used when it is necessary in the circumstances to do so to stop that threat.²⁸ A threat purely to property does not justify the use of firearms under international law.

Under international law, intentional lethal use of firearms—"shooting to kill"—can only ever be lawful when such use is strictly unavoidable to protect life.²⁹ This is a truly exceptional circumstance, such as to prevent the imminent detonation of a bomb or the killing of a hostage. A threat to life that is not imminent can never justify shooting with intent to kill. This has been called the "protect life" principle – a life may not be taken intentionally unless doing so is the only way to protect another life from an imminent threat.

²³ Principle 5(c), 1990 *UN Basic Principles*.

²⁴ Principle 11(d), 1990 *UN Basic Principles*.

²⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN doc. A/HRC/26/36, 1 April 2014, para. 46.

²⁶ Principle 9, 1990 *UN Basic Principles*.

²⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN doc. A/HRC/26/36, 1 April 2014, para. 59.

²⁸ Principle 9, 1990 *UN Basic Principles*.

²⁹ Principle 9, 1990 *UN Basic Principles*.

This overview was drafted by researchers attached to the [“Freedom from Violence”](#) project of the [Institute for International and Comparative Law in Africa](#) and the [Centre for Human Rights, Faculty of Law](#), University of Pretoria. Christof Heyns, Stuart Maslen and Thomas Probert were involved in developing the new UN and AU instruments on the use of force (adopted during the last five years), as described above. For an overview of the use of force laws of all countries worldwide, see <https://www.policinglaw.info/> For further inquiries, contact pumeza.matwa@up.ac.za

This document is also available on: <http://www.icla.up.ac.za/images/news/2020/Global-and-Regional-Rules-on-Police-Use-of-Force-20-May-2020.pdf>